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No. 84- .

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In the
Supreme Court of the United States.

OCTOBER TERM, 1984.

DOCUMATION, INC., S. RAY HALBERT,
RICHARD J. TESTA, ROBERT S. AMES,
JOHN H. HOLCOMB, JR., JAMES F. MORGAN
AND TEXTRON, INC.,
PETITONERS,
v.
DAVID A. AND SYLVIA S. LIPTON,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

BERNARD J. BONN, III,
Sixty State Street,
Boston, Massachusetts 02109.
(617) 367-7500
Counsel of Record for Petitioners

Of Counsel:

TESTA, HURWITZ & THIBEAULT,
Boston, Massachusetts.
JEFFREY B. RUDMAN,
HALE & DORR,
Boston, Massachusetts.
KENNETH A. PLEVAN,
SKADDEN, ARPS, SLATE, MEAGHER & FLOM,
New York, New York.
R. LEE BENNETT,
PEIRSOL, BOROUGHS, GRIMM, BENNETT & GRIFFIN,
Orlando, Florida.

October 22, 1984

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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Question Presented.

Whether a complaint seeking damages for alleged violations of Section 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b-5 states a claim upon which relief can be granted when plaintiffs admit they did not read or rely upon the allegedly misleading documents and the complaint, asserting a "fraud on the market" theory, alleges merely that plaintiffs purchased securities relying "on the integrity of the market prices" of those securities and that because of the misrepresentations and omissions alleged "the market prices of . . . [the] securities were artificially inflated" and there is no allegation that the securities would not have been marketed at all but for the misrepresentations and omissions complained of?

This question presented is that which was certified by the district court pursuant to 28 U.S.C. § 1292(b) and answered in the affirmative by the court of appeals. It presents the issues which this Court granted certiorari to consider but was denied the opportunity to do so when the action was dismissed by the appellee. *Panzirer* v. *Wolf*, 663 F.2d 365 (2d Cir. 1981), *cert. granted sub nom., Price Waterhouse* v. *Panzirer*, 458 U.S. 1105, *vacated as moot*, 459 U.S. 1027 (1982).

Parties Below.

Petitioners Documation, Inc., S. Ray Halbert, Richard J. Testa, Robert S. Ames, John H. Holcomb, Jr., James F. Morgan and Textron Inc. (the "Documation Defendants") were appellants in the proceedings below. Peat, Marwick, Mitchell & Co. ("Peat, Marwick") also was an appellant below and David A. and Sylvia S. Lipton were appellees.

Peat, Marwick is filing with this Court on October 22, 1984 a separate Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit (the "Peat, Marwick Petition"). The Documation Defendants hereby join in and incorporate by reference the Peat, Marwick Petition for the reasons set forth therein, except to the extent that Peat, Marwick bases its Petition on grounds that relate solely to the public accounting profession and/or independent auditors. The Documation Defendants do not disagree with the Peat, Marwick arguments that relate to the public accounting profession and/or independent auditors, but simply note that those arguments do not apply directly to the Documation Defendants.

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DAVID A. AND SYLVIA S. LIPTON,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Opinions Below.

The decision of the United States Court of Appeals for the Eleventh Circuit is reported at 734 F.2d 740 and is set forth in the appendix to the Peat, Marwick Petition commencing at p. 1a. (All references to the appendix are to the Peat, Marwick

appendix.) The petition for rehearing and suggestion for rehearing en banc was denied without opinion (A. 32a-33a). The decision of the United States District Court for the Middle District of Florida (Kovachevich, J.), affirmed by the Eleventh Circuit, is reported at [1982] CCH Fed. Sec. L. Rep. ¶98,788, and is set forth in the appendix (A. 15a-23a). The Eleventh Circuit had agreed to hear the appeal following certification of the question presented for review here as a controlling question of law pursuant to 28 U.S.C. § 1292(b) (1982) (A. 24a-29a).

Jurisdiction.

The decision of the Court of Appeals denying rehearing and rehearing en banc of its June 18, 1984, decision was filed on July 23, 1984. Jurisdiction is conferred on the Court by 28 U.S.C. § 1254(1) (1982).

Statutory Provisions.

Section 10(b) of the Securities Exchange Act of 1934 (the "1934 Act"), 15 U.S.C. § 78j(b) (1982), reads as follows:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —
>
> * * *
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Pursuant to the authority granted by Section 10(b), the Securities and Exchange Commission in 1942 promulgated Rule 10b-5, now 17 C.F.R. § 240.10b-5 (1983), which reads as follows:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

Statement of the Case.

Plaintiff's amended complaint is set forth in the appendix commencing at p. 34a. The defendants moved to dismiss the amended complaint. On August 18, 1982, the district court denied defendants' motions to dismiss the § 10(b) counts while granting Peat, Marwick's motion to dismiss pendent common law claims for negligence (A. 15a-23a).

The district court, on December 1, 1982, granted the defendants' motions for certification of the question presented here (A. 24a-28a).

On January 25, 1983, the Eleventh Circuit granted defendants' petition for leave to appeal (A. 29a).

On June 18, 1984 (following oral argument on March 12, 1984), a Panel of the Eleventh Circuit rendered the decision (A. 1a-14a) which is the subject of this petition. The Documation Defendants' petition for rehearing and suggestion for rehearing en banc of that decision was denied on July 23, 1984 (A. 32a-33a).

Because of the procedural posture of this action, there are no issues of fact. The allegations of plaintiffs' amended complaint are taken as true. *Conley* v. *Gibson*, 355 U.S. 41 (1957). Thus, the absence of factual disputes make this an even more appropriate vehicle for resolution of the question presented than *Panzirer* v. *Wolf*, 663 F.2d 365 (2d Cir. 1981), *cert. granted sub nom. Price Waterhouse* v. *Panzirer*, 458 U.S. 1105, *vacated as moot*, 459 U.S. 1027 (1982).

The amended complaint (A. 34a-61a) alleges that subject matter jurisdiction is found in § 27 of the 1934 Act, 15 U.S.C. § 78aa (1982), and in the principle of pendent jurisdiction (A. 34a-35a).

Count I of the four-count amended complaint seeks to state a claim against the Documation Defendants for alleged violations of § 10(b) and Rule 10b-5 (A. 40a-55a). Count II seeks to state a claim against Peat, Marwick alone for alleged violations of § 10(b) and Rule 10b-5 in connection with Peat, Marwick's reports concerning Documation's financial statements for fiscal 1977 and fiscal 1978 (A. 55a-58a). Counts III and IV seek to state claims against all defendants for common law fraud and deceit and for common law negligence or gross negligence (A. 59a-60a).

The amended complaint alleges in Count I that the Documation Defendants participated in the preparation and issuance of various documents relating to Documation, including annual reports, prospectuses, quarterly reports and press releases,

which allegedly contained misrepresentations of material facts concerning Documation's revenue recognition and accounting for inventory.

According to the amended complaint, the result of the "dissemination" of the allegedly false and misleading information regarding Documation was to cause "the market prices of Documation securities" to be "artificially inflated during the class period" (A. 55a). There is no allegation in the amended complaint that the named plaintiffs or any member of the class they seek to represent saw or relied in any way upon any of the allegedly misleading documents. Rather, it is alleged only that "plaintiffs and other members of the class relied, to their damage, on the integrity of the market prices of Documation securities during the class period in purchasing their Documation securities" (A. 55a).

While plaintiffs preface the alleged misstatements and omissions in paragraphs 23-32 (A. 41a-48a) of the amended complaint with the naked assertion in paragraph 22 that the Documation Defendants engaged in a common course of conduct (A. 40a-41a), a review of the amended complaint shows that the alleged course of conduct consisted of no more than the issuance of Documation's annual reports, prospectuses, quarterly reports and press releases — the very documents on which the plaintiffs do not and cannot allege reliance and which allegedly contained the untrue statements or omitted to state material facts.

Reasons for Granting the Writ.

THE QUESTION PRESENTED RAISES AN UNRESOLVED ISSUE OF FUNDAMENTAL IMPORTANCE.

As noted *supra* at p. ii, the Documation Defendants join in and incorporate by reference the Petition for a Writ of Certiorari of Peat, Marwick, Mitchell & Co. dated October 22, 1984 for the reasons set forth therein, except to the extent that Peat, Marwick bases its Petition on grounds that relate solely to the public accounting profession and/or independent auditors. The Documation Defendants do not disagree with the arguments of Peat, Marwick that relate to the public accounting profession and/or independent auditors, but simply note that those arguments do not apply directly to the Documation Defendants.

Accordingly, for the reasons set forth in the "Reasons for Granting the Writ" portion of the Peat, Marwick Petition, the Petition of the Documation Defendants too should be granted.

Conclusion.

For the reasons set forth above and for the reasons set forth in the Peat, Marwick Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BERNARD J. BONN, III,
Sixty State Street,
Boston, Massachusetts 02109.
(617) 367-7500
Counsel of Record for Petitioners

Of Counsel:

TESTA, HURWITZ & THIBEAULT,
Boston, Massachusetts.
JEFFREY B. RUDMAN,
HALE & DORR,
Boston, Massachusetts.
KENNETH A. PLEVAN,
SKADDEN, ARPS, SLATE, MEAGHER & FLOM,
New York, New York.
R. LEE BENNETT,
PEIRSOL, BOROUGHS, GRIMM,
BENNETT & GRIFFIN,
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